IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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CODY J. S.,

Plaintiff,

v.

Civil Action No.
5:22-CV-0251 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LAW OFFICES OF
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JUSTIN GOLDSTEIN, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
6401 Security Boulevard
Baltimore, MD 21235

KRISTINA COHN, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff

seeks judicial review of an adverse administrative determination by the Commissioner of Social Security ("Commissioner"), pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3) are cross-motions for judgment on the pleadings.[1] Oral argument was conducted in connection with those motions on May 3, 2023, during a telephone conference held on the record. At the close of argument, I reserved decision on the motions. At a supplemental hearing held on May 8, 2023, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Plaintiff's motion for judgment on the pleadings is GRANTED.

[1] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

David E. Peebles
U.S. Magistrate Judge

Dated: May 10, 2023
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
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CODY JAMES S.,

Plaintiff,

vs. 5:22-CV-251

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
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Transcript of a **Decision** held during a Telephone Conference on May 8, 2023, the HONORABLE DAVID E. PEEBLES, United States Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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(The Court and counsel present by telephone, 2:00 p.m.)

THE CLERK: We're on the record in the case of Cody James S. versus Commissioner of Social Security, Case Number 5:22-CV-251, Counsel, can you please state your appearances for the record starting with plaintiff.

MR. GOLDSTEIN: Good afternoon, this is Justin Goldstein for plaintiff.

MS. COHN: Good afternoon, Kristina Cohn for Commissioner of Social Security.

THE COURT: All right, good afternoon, Counsel. I've had an opportunity now to reflect on this case further, including the arguments that were raised last week during our hearing, and also the supplemental briefing which I appreciate that both of you provided, and I'm prepared to make a ruling.

Plaintiff has commenced this action pursuant to 42 United States Code Sections 405(g) and 1383(c)(3) to challenge an adverse determination by the Commissioner of Social Security finding that he was not disabled at the relevant times and therefore ineligible for the benefits for which he applied.

The background is as follows: Plaintiff was born in October of 1993, he is currently 29 years of age. Significantly, he was 25 years old on the date he made

application for benefits in July of 2018. Plaintiff stands 5 foot 5 inches in height and weighs approximately 179 pounds. Plaintiff lives in Cortland in a trailer home with his mother and his mother's boyfriend. Plaintiff has a 12th grade education. While in school he was in special education, classified as learning disabled. It's unclear whether he received an IEP diploma or a regular diploma. Plaintiff has a driver's license but rarely drives, stating that he is too afraid to drive.

In terms of work, plaintiff has very little prior work experience. He stopped working in June of 2018. Prior to that time for short periods he was in part-time positions as a restaurant customer service person and a grocery store/retail store stocker. He also spent one month as a laborer/production in a factory. That was a full-time position in 2017.

Physically, plaintiff suffers from type II diabetes, and a history of nose and stomach issues. Mentally, he experiences borderline intellectual functioning, a learning disorder, and anxiety. Plaintiff has received treatment from Family Care Medical Group since 2017, primarily from Dr. Lynn Cunningham, who he characterizes as his primary doctor.

Plaintiff has several activities of daily living according to him in his function report and in statements

that he has made to others. He watches television, plays video games, watches movies, visits with a friend, takes out the trash, he cooks, cleans, does laundry, shops, he can shower and dress. He noted that his mother helps him with many of these chores. As I indicated, he does little driving. He did testify that he can take public transportation.

Procedurally, plaintiff applied for Title XVI Supplemental Security Income benefits on July 10, 2018, alleging disability based upon a learning disability, slow comprehension, anxiety, and diabetes. A hearing was conducted by Administrative Law Judge John P. Ramos on November 19, 2019 to address that application. ALJ Ramos issued an unfavorable decision on December 17, 2019. That decision was vacated and the matter remanded by the Social Security Administration Appeals Council on October 21, 2020. ALJ Ramos conducted a second hearing on February 23, 2021, following which he issued another unfavorable decision on March 17, 2021. The Social Security Appeals Council denied plaintiff's application for review of that determination on January 20, 2022. This action was thereafter commenced on March 15, 2022, and is timely.

In his second decision, Administrative Law Judge Ramos applied the familiar five-step sequential test for determining disability.

He found at step one that plaintiff had not engaged in substantial gainful activity since July of 2018.

At two, he concluded that plaintiff does suffer from severe impairments that impose more than minimal limitations on his ability to perform basic work functions, including borderline intellectual functioning and a learning disorder. He rejected diabetes based upon medical showing that the diabetes is controlled through medication and treatment.

At step three, ALJ Ramos concluded that plaintiff's conditions do not meet or medically equal any of the listed presumptively disabling conditions set forth in the Commissioner's regulations, including Listing 12.05 and 12.11.

After surveying the evidence in the record, ALJ Ramos concluded that plaintiff has a residual functional capacity, notwithstanding his impairments, to perform a full range of work at all exertional levels with various additional limitations, many of which, if not most, frankly, relate to his mental capabilities, and I'll discuss that in more detail further on.

At step four, ALJ Ramos concluded that plaintiff does not have any past relevant work to compare and went on at step five where he concluded, after considering the testimony of a vocational expert, that plaintiff can perform

the work of a janitor, packager, and a warehouse worker as three representative positions, and therefore concluded that plaintiff was not disabled at any relevant time.

As the parties know, my function is limited, the standard that I apply is extremely deferential. I must determine whether correct legal principles were applied and whether the resulting determination is supported by substantial evidence, which is defined as such relevant evidence as a reasonable mind would find sufficient to support a conclusion. The standard has been addressed on many occasions by the Supreme Court and the Second Circuit Court of Appeals. The latter court addressed it in *Brault v. Social Security Administration Commissioner*, 683 F.3d 443, from June of 2012, and characterized the standard as extremely stringent. The Second Circuit reiterated the standard in *Schillo v. Kijakazi*, 31 F.4th 64 from April 6, 2022.

In support of his challenge to the determination, plaintiff offers several arguments. He contends that the residual functional capacity finding, or RFC, is not supported. As subthemes of that argument, he questions Judge Ramos' elimination of the need for frequent direct supervision from his earlier decision and whether that violates the Social Security Administration Appeals Council's remand order.

Secondly, he contends that the administrative law judge failed to evaluate the opinion of Connie Mantey, who is an employment specialist, regarding the need for constant supervision. He also argues that there improperly is no discussion of a report from a school psychologist Tamara Cass, and fourth, that the administrative law judge failed to properly evaluate the achievement test results reflected in Ms. Cass' opinion. He also argues that the step five determination is improper, and indefensible because the jobs identified require reasoning and language skills above plaintiff's ability.

Third, he argues that step two and step three determinations are not properly explained and subsumed with that is the contention that if the education records of the plaintiff were properly considered, he would meet or equal one of the listed presumptively disabling conditions.

The fourth argument is that there was an improper evaluation of Dr. Grassl's opinion.

At the hearing, plaintiff raised the additional contention that the statement that, in Administrative Law Judge Ramos' decision that plaintiff has a high school education is erroneous and also clarified that there is a conflict between the Dictionary of Occupational Titles, or DOT, and the vocational expert's testimony, that is, should have been teased out by the administrative law judge

concerning the language and reasoning skills required for the three jobs identified.

Let me first address the high school diploma issue which I found to be fascinating. It is true that in his decision at page 21, Administrative Law Judge Ramos stated that plaintiff has at least a high school education. The matter is addressed in 20 C.F.R. Section 416.964 which sets out four categories of education. The fourth is high school education and above which is defined to mean, "abilities in reasoning, arithmetic, and language skills acquired through formal schooling at a 12th grade level or above." It goes on to say, "We generally consider that someone with these educational abilities can do semi-skilled work through skilled work."

The achieved -- well, the achievement tests, the Wechsler Individual Achievement Test Third Edition, or WIAT, results were reported by Ms. Cass in her report dated February 27, 2012. It reflects that plaintiff has a reading comprehension score of 68, which puts him in the 2nd percentile; a word reading score of 61, .5 percentile; oral reading fluency, 61, .5 percentile; spelling, 64, puts him in the 1 percentile. These would suggest plaintiff is more likely in the limited education category as defined in Section 416.964 of the Regulations which provides as follows: "Limited education means ability in reasoning, arithmetic,

and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. We generally consider that a 7th grade through the 11th grade of formal education is a limited education."

Social Security Ruling SSR 20-01p speaks in terms of evaluating an individual's education quality. It says that, "education primarily means formal schooling or other training that contributes to an individual's ability to meet vocational requirements, such as reasoning ability, communication skills, and arithmetical ability." The ruling goes on to say that, "the highest numerical grade level that the individual completed in school may not represent his or her actual educational abilities." It goes on further to say, "When determining the appropriate education category, we may consider whether an individual received special education. For example, an extensive history of special education may show that the individual's educational abilities are lower than the actual grade he or she completed."

I think in this case the administrative law judge did commit error when stating that plaintiff has at least a high school education. The error, however, I find is harmless because in the vocational expert hypothetical included at page 61 to 62 of the administrative transcript,

the vocational expert was told that the plaintiff is of limited education and as a result, identifies the three jobs at issue, so I don't find any error in that regard.

Plaintiff's next arguments focus on the residual functional capacity finding of the plaintiff. A claimant's RFC, of course, represents the range of tasks he is capable of performing notwithstanding his impairments. That means a claimant's maximum ability to perform sustained work activities in an ordinary setting on a regular and continuing basis, meaning eight hours a day for five days a week, or an equivalent schedule, and of course an RFC determination has been formed by consideration of all of the relevant medical and other evidence.

In this case, the RFC provides as follows, after identifying the -- that the plaintiff can perform all exertional levels, ALJ Ramos went on to find the following: "He retains the ability to understand and follow simple instructions and directions; perform simple tasks with supervision and independently," not sure what that means, "maintain attention/concentration for simple tasks; and regularly attend to a routine and maintain a schedule. He can relate to and interact with coworkers and supervisors to the extent necessary to carry out simple tasks -- i.e., he can ask for help when needed; accept instructions or criticism from supervisors; handle conflicts with others;

state his own point of view; initiate or sustain a conversation; and understand and respond to physical, verbal and emotional/social cues associated with simple work. He can have brief, occasional interaction with the public. He can make decisions directly related to the performance of simple work, and he can handle usual workplace changes and interactions associated with simple work. The claimant should work in a position where he is not responsible for the work of or required to supervise others. He should work in a position with little change in daily work processes or routine. Finally, the claimant can perform work that involves one- or two-step rote tasks with no written instructions or written record keeping."

The RFC in this case I find is supported by substantial evidence, including the report of Dr. Grassl, who found no limitations -- Dr. Corey Anne Grassl in her report dated October 15, 2018 found no evidence of limitations in certain areas and only moderate limitations in the ability to understand, remember, and apply complex directions and instructions, use reason and judgment to make work-related decisions, and sustain concentration and perform a task at a consistent pace. The RFC is also supported by the prior state agency administrative determination of Dr. S. Hennessey from November 13, 2018.

The issue of elimination of direct supervision

requirement in the RFC is a more troublesome one. The earlier decision provides that the claimant requires frequent direct supervision. In its remand order, the Appeals Council noted that the residual functional capacity indicates that the claimant requires frequent direct supervision. It is unclear from the decision what basis exists for such a limitation. It goes on to direct that on remand, the administrative law judge further evaluate the claimant's mental impairments, give further consideration to the claimant's maximum RFC, and if warranted by the expanded record, obtain supplemental evidence from a vocational expert to clarify the effect of the assessed limitations on claimant's occupational base. Rather than directly heeding the Appeals Council's position, the administrative law judge simply eliminated the requirement. I do agree with the Commissioner that ordinarily, after a remand order from the Appeals Council, review is de novo and there is no obligation to include the same limitations in a subsequent decision. This is a little different situation, however. The first RFC included that limitation, there's no question that it obviously came from an opinion provided by employment specialist Connie Mantey on August 30, 2019. It's frankly the only thing in the record I could find that deals with the need for a job coach or continuous supervision, that appears at 358 and 359. Unfortunately, however, the administrative

law judge did not discuss or even mention Ms. Mantey's opinion in either of his two decisions. Under the circumstances, I think the Administrative Law Judge Ramos committed a legal error, and one that requires remand.

The next argument addresses the evaluation of opinions. Based on the filing date of this case, it is subject to the new Commissioner's regulations concerning evaluation of opinions which considers whether they are persuasive, primarily by considering whether the opinions are supported by and consistent with the record in the case. The ALJ, under the regulations, must address the issues of supportability and consistency but need not address the other relevant factors, although they should be taken into consideration. The -- of course the weighing of conflicting opinions, if there are any in the record, is reserved to the Commissioner in the first instance. *Veino v. Barnhart*, 312 F.3d 578, Second Circuit 2002.

As I indicated, Connie Mantey gave an opinion in this case at 358, 359, from August 27, 2019. After a trial run at a position with an agency, Ms. Mantey stated the following: "Cody will need a supervisor on site to give him continuous directions to help him stay focused." Her title is employment specialist which I liken to a vocational rehabilitation counselor. The regulations suggest at 20 C.F.R. Section 416.902(j) that, while it isn't specific to

this position, it suggests that the, Ms. Mantey is a nonmedical source.

I note that the prior SSR 06-03p which is now rescinded explicitly listed these types of rehabilitation counselors as nonmedical source and that appears also to be supported by the decision in *Sagman v. Commissioner of Social Security*, 2021 WL 5831114 from the Southern District of New York, November 17, 2021. The opinion of Ms. Mantey, if accepted, would seem to preclude employment since it would require the presence of a job coach. Ms. Mantey, Ms. Mantey's opinion, as I indicated, is not discussed in either of the decisions by ALJ Ramos. It is true that 20 C.F.R. Section 416.920c(d) states that there is no requirement to discuss the evaluation of a nonmedical opinion, however, as you'll see further on, I think that may be trumped by another consideration having to do with plaintiff's age.

There is also an opinion in the record of Tamara Cass from 342 to 348, she is a school psychologist, and although this predates the -- the date of application by six years, nonetheless, it is significant. It's not discussed by ALJ Ramos. Ms. Cass is an acceptable medical source. However, there is case law that to suggest that because of its age and the fact that it predated by six years the application in this case, there is no reason to consider and

analyze its impact upon the administrative law judge. *Williams v. Colvin*, 98 F.Supp.3d 614 from the Western District of New York, April 10, 2015, and *Krach*, 2014 WL 5290368 from the Northern District of New York, October 15th, 2014.

The medical source statement of Dr. Corey Anne Grassl I indicated finds relatively few limitations, it's at 396 to 399 from October 15, 2018. As the ALJ references, it was based upon a thorough examination. Granted, she did not have available to her plaintiff's education records but there is no requirement to obtain them. Dr. Grassl's opinion as a consultative examiner can constitute substantial evidence. I believe there is no error in not including greater limitations on the ability to interact than opined, and moderate limitation in ability to sustain concentration, perform at a consistent pace is not inconsistent with simple unskilled work.

Another thorny issue in this case really is consideration of plaintiff's education records, and specifically the report of Ms. Cass. As a backdrop, it is clearly plaintiff's burden to establish a limitation in the ability to perform work functions. The RFC in this case is extremely limiting and specific. In his decision, ALJ Ramos addressed the intelligence scores, the IQ scores that were reported in Ms. Cass' opinion, that's at page 15 to page 16,

and that formed the basis frankly for the ALJ's finding of a borderline intellectual functioning. Listing 12.05 deals with this, and it is not met or equaled in this case because there's no IQ score of less than 70 and even so, if there was, plaintiff would still have to meet additional B criteria, one extreme limitation or two marked limitations in the domains specified. Clearly the report is from six years ago, when it comes to IQ, the POMS, and specifically DI 24583.055, suggests that IQ scores stabilize after age 16 and are generally considered current at that time. This report was prepared when plaintiff I believe was 18 years of age, so the -- it still would be an accurate reflection of plaintiff's IQ.

Can't say the same, however, with regard to achievement. Achievement can fluctuate and vary over a period of six years. The achievement scores in my view cannot be substituted for IQ scores to determine if plaintiff meets or equals a listing, and specifically Listing 12.05. There's clearly scores related to low reading ability and spelling ability but it doesn't necessarily translate to an inability to remember and apply information. Plaintiff's case -- and arguing otherwise is distinguishable. Plaintiff relies on *F.S. v. Astrue*, 2012 WL 514944 from the Northern District of New York, February 15, 2012, that's a childhood disability case and in a childhood disability, it would be

appropriate to analyze whether there's functional equivalence. This is not a childhood disability case, however. And even if it could be considered that the achievement test scores, the regulations show that it is not necessarily dispositive, but instead those scores would have to be interpreted in light of all evidence of plaintiff's actual level of functioning.

However, the matter is complicated by consideration of SSR 11-2p. Under that, plaintiff is defined as a young adult, and it requires consideration of evidence, including from medical and nonmedical sources. The ruling specifically provides that evidence from other sources who are not medical sources but who know and have contact with the young adult can also help us evaluate the severity and impact of a young adult's impairments. Those sources include family members, educational personnel, for example, teachers and counselors, public and private social welfare agency personnel, and others. I believe under SSR 11-2p, the opinion of Ms. Cass and also Ms. Mantey should have been considered and it was error not to consider them. I think that trumps the argument that because of its age and it was outside the relevant period, Ms. Cass' opinion, for example, need not be addressed. I think the better practice would have been to address them both.

The last issue is the DOT conflict. The vocational

expert only identified, when asked about a conflict with the DOT, the off-task, absenteeism, and contact with people and not depending on other persons, not address -- as not being addressed by the DOT, that's at page 64. Clearly, if there is a conflict, then SSR 00-04p requires the administrative law judge to examine the conflict. That is supported by *Lockwood v. Commissioner of Social Security Administration*, 914 F.3d 87 from the Second Circuit, 2019. The Second Circuit in that decision noted the ruling mandates that whenever the -- a vocational ruling -- I'm sorry, the ruling mandates that whenever the Commissioner intends to rely on a vocational expert's testimony, he must identify and inquire into all those areas where the expert's testimony seems to conflict with the Dictionary. In other words, the ruling requires the Commissioner to obtain a reasonable explanation for any apparent, even if nonobvious, conflict, between the Dictionary and a vocational expert's testimony. It goes on to say the importance of teasing out such details is precisely why the Commissioner bears an affirmative responsibility to ask about any possible conflict between the vocational expert's evidence and the information provided in the Dictionary, citing SSR 00-4p. Absent such an inquiry, the Commissioner lacks substantial basis for concluding that no such conflict in fact exists. And of course this must be considered against the backdrop that at step five, it is the

Commissioner who bears the burden of proof.

There are three positions identified. One is cleaner, industrial. For a language level, DOT 381.687-018 requires the following: Reading, passive vocabulary of 5,000 to 6,000 words, read at rate of 190 to 215 words per minute, read adventure stories and comic books, looking up unfamiliar words in dictionary for meaning, spelling, and pronunciation, read instructions for assembling model cars and airplanes.

The second position identified as packager/hand is the subject of Dictionary of Occupational Titles 920.587-018, it provides for a reasoning level of 2, apply common sense understanding to carry out detailed but uninvolved written or oral instructions, deal with problems involving a few concrete variables in or from standardized situations, and for reading, language level, reading, recognize meaning of 2500 two- or three-syllable words, reading rate of 95 to 120 words per minute, compare similarities and differences between words and between series of numbers.

The third is laborer, stores, it is subject of DOT 922.687-058 and for language, it requires reading, recognize between -- meaning of 2500 two- or three-syllable words, read at a rate of 95 to 120 words per minute, compare similarities and differences between words and between series of numbers. For writing, it requires, print sample sentences containing subject, verb, and object and series of numbers, names, and

addresses.

In my view, since this is not addressed and it's unclear whether plaintiff can meet these requirements, the administrative law judge was required to further examine the vocational expert and the failure to do that, again, constituted legal error.

So for all the reasons indicated, I believe there are multiple errors in this case and that judgment on the pleadings should be granted to the plaintiff. I do not find persuasive evidence of disability but I think this frankly should be looked at by a fresh set of eyes and I understand the Commissioner's regulations to require that after an administrative law judge has seen a matter twice, it will be reassigned to another administrative law judge which I think is a good idea in this case. So I will grant judgment on the pleadings to the plaintiff and vacate the Commissioner's determination, remand the matter for further proceedings. Thank you both for excellent presentations last week. Have a great day.

MR. GOLDSTEIN: You too, thank you.

MS. COHN: Thank you.

(Proceedings Adjourned, 2:38 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 9th day of May, 2023.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter